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Supreme Court, U.S.
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NO.04-523

IN THE
SUPREME COURT OF THE
UNITED STATES

John R. Wyss, et al.,
Petitioners,

v.

City of Hoquiam, et al.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT NO: 04-35020
D.C. No. CV-02-05529-JKA

REPLY BRIEF OF JOHN R. WYSS, ET AL.

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I.

REVIEW OF THE COURT BELOW'S DECISION IS WARRANTED BECAUSE RIGHTS OF HOMEOWNERS ARE OF NATIONAL IMPORTANCE

In their opposition, Respondents concernedly remark "Although it is a sad fact of life that some persons see fit to occupy neglected and unsafe structures, this does not overcome the clear and substantial interest of the City in the protection of human life, including that of the Petitioner. By requiring him to vacate the building the City acted for his protection, and to protect others who occasionally visited the property" (Brief in Opposition, page 20, lines 7-13)

City gives no support that any of the occasional visitors, mostly neighbors who had been friends with the prior owner of the home were ever exposed to hazard. The remarks are simply condescending.

In fact, all supporting evidence regarding the claims Hoquiam makes about the condition of the building are self serving, and generated after it forced the owner from the building, allowed vagrants, vandals and months of bad weather to further damage the structure, which the Petitioner had taken care to protect for a complete renovation, and maintained an effective system of fans, pumps, heat and aeration to protect the foundation and framework of the structure. The cutting of power to the building at building inspector's request on October 22, 1999, while Petitioner was

awaiting his hearing, scheduled for December 1, 1999 caused great damage.

City action constituted a deprivation of Due Process or Equal Protection. City official did not act lawfully under a "narrowly drawn statute"

> "the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." Fuentes v. Shevin, 407 U.S. 67 (1972)at 90-92.

Here, said "narrowly drawn statute" is the 1997 Uniform Code for the Abatement of Dangerous Buildings; §403.1; §404; §501.1 and §504.

Persons initiating the seizure of Petitioner's home had no concern for adherance to the law, and instead abused its police power in commission of its arbitrary acts, now claiming they were for Petitioner's own "protection".

As noted prior, over 18 months of Petitioner's occupancy never resulted in a single injury or incident involving hospitalization or a police report. This fact alone casts doubt upon the Respondents concern for anything other than not being held responsible for its willful torts.

In discovery attempts Hoquiam's answers were considered "disingenuous" by the District Court Judge, the Honorable J. Kelly Arnold, in granting MOTION TO COMPEL to Petitioner(Order, United States District Court, Western District Of Washington, No. CO2-5529, July 9, 2003).

Shortly after that, Hoquiam ignored three subpoenas properly issued and served upon officials of Hoquiam August 11, 2003, wherein Petitioner asked for documents for his discovery. Hoquiam's attorneys denied any need to respond, under their claim that everything asked for had already been voluntarily given by them. The documents requested have never been produced by Hoquiam, due to that stonewalling and lack of cooperation.

Petitioner's resources and legal acumen barely compete with the several high profile "guns for hire" attorneys paid for by the Washington Cities Insurance Authority, which defends Hoquiam in its railroading down of homeowners' rights.

City agenda is to push through its desire of aesthetics changes to main street as cheaply and quickly as possible has outweighed the importance of adhering to laws which it adopted, or rights which the 1997 Uniform Code For The Abatement Of Dangerous Buildings provides for all effected homeowners.

II.

"1997 UNIFORM CODE FOR THE ABATEMENT OF DANGEROUS BUILDINGS" LIMITS CITY EXERCISE OF POLICE POWER WHILE APPEAL IS PENDING.

City of Hoquiam, Washington, after adopting 1997 Uniform Code For The Abatement of Dangerous Buildings, brought an abatement action against Petitioner, then forced property owner from his home just 30 days after merely sending its "notice and orders" to Petitioner, without first providing an opportunity to a hearing by its "Board of Appeals", even though Petitioner's appeal to the Board was timely filed.

Said 1997 Uniform Code For The Abatement of Dangerous Buildings specifically outlaws Hoquiam's action, and the Code's Section 5, Appeal, is written to guard a homeowner's protected rights. In violating homeowner's appeal rights under its abatement code relating to "dangerous buildings", by prematurely executing its "notice and orders" Hoquiam violated Petitioner's rights to Due Process and Equal Protection, *ipso facto*.

Hoquiam's opposition, and the decisions of the Courts' below, fail to address Hoquiam's breach of said Code's Section 5, Appeal and its well defined homeowner rights regarding any abatement of any "Dangerous Building".

Once adopted as its law, Hoquiam does not have an option of regarding one "dangerous building" as being more dangerous than others to which it would

apply the code, and thus in a standardless, arbitrary or selective method to not apply due process and hearing rights of the code.

Thus, Hoquiam's legitimate exercise of police power only extends to within the scope of its adopted code:

> 1997 Uniform Code for the Abatement of Dangerous Buildings:
> Chapter 1, TITLE AND SCOPE, Section 102- PURPOSE AND SCOPE
> 102.2 Scope. "*The provisions of this code shall apply to all dangerous buildings, as herein defined,* which are now in existence or which may hereafter become dangerous in this jurisdiction."
> (italics added)
> Chapter 2, ENFORCEMENT, Section 205- BOARD OF APPEALS
> 205.1 General. "..The building official shall be an ex officio member and shall act as secretary to the board, but shall have no vote upon any matter before the board. *Appeals to the board shall be processed in accordance with the provisions contained in Section 501 of this code.*" (excerpt)

Under the property owner's right to appeal in Section 501.1 Appeal, prior to "Enforcement of Any Order", as described in the Petitioner's Reasons For Granting The Writ (Petition, pages 18-27), nothing shy of a clear and present emergency

could legitimately remove the homeowner from his home prior to his hearing on his timely filed appeal, EVEN IF the building is a "dangerous building".

The Code, adopted by Hoquiam, clearly under Section 504- Staying of Order Under Appeal, stays execution of any "notice and order" (Petition, page 24). Any action to enforce is forbidden.

Nor does "Qualified Immunity" apply to perpetrators of the deprivations to Wyss, under the excuse that an immediate need existed at the time to protect health and safety of the public.

No provisions of the abatement codes allowed for other than proper procedure for a hearing prior to enforcement of any orders of the building official, in fact the Code forbids other than a proper procedure:

> 205.2 Limitations of Authority. The board of appeals shall have no authority relative to interpretation of this code nor shall the board be empowered to waive requirements of this code.

The building official illegally and prematurely enforced an order while an assured hearing was pending, as evidenced by the city official's posting of "DO NOT ENTER" on October 5th, 1999, and its letter of October 22nd, 1999 to Grays Harbor P.U.D. calling for power disconnection, and the P.U.D.'s cutting of wires to the property immediately to

make certain occupancy of home could not continue.

No one acted properly under warrant or a specific code or statute, nor in a clear case of emergency in the deprivation of Wyss's protected rights:

> Monroe v. Pape, 365 U.S. 167, (1961): "The statutory words "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" do not exclude acts of an official or policeman who can show no authority under state law, custom or usage to do what he did"

Respondent appears to purposely misconstrue Petitioner's reference to Parratt v. Taylor, 451 U.S. 527 (1981).

In considering the analysis in Parrat, Justice Blackmun would probably not have found that Hoquiam's actions to throw a homeowner out while he lawfully awaited a scheduled hearing to be legitimate use of its police power, nor would he think Hoquiam's disregard for its own adopted codes by not observing a stay of order under appeal were "random and unauthorized", as opposed to the serious illegal offenses that they were.

Although not federal, references to Constitutionally protected rights abound in the following excerpts from the case: Roper et al. v. Winner et al., No. 12340,Court of Civil Appeals of Texas, San Antonio 244 S.W.2d 355; 1951 Tex.

App., discussing the importance of appeal and hearing rights, and the need to hear prior to seizure of a home:

> "Even the powers of the Building Official have been stated in the Building Code, and they are measured by the terms of that grant. Those powers "must be executed in the manner directed and by the officer specified"43 Am.Jur. Public Officers Sec. 249; People v. Gibson, 53 Colo. 231, 125 P. 531. The right to take action against owners of buildings depends upon legislation which is here embodied in the City Building Code, and it fails to authorize such action as was undertaken by the city officers. The officers are not without authority to proceed as the ordinance permits; they are without authority to proceed otherwise. Department of Insurance v. Church Members Relief Ass'n, 217 Ind.58,26 N.E.2d 51, 128 A.L.R. 635.
>
> (continued.....)"The doors were closed without notice, without hearing, whether the owners were guilty or innocent, right or wrong, with no opportunity to correct the defects, and contrary to and in excess of the method required by the very law invoked by the authorities here sued.
>
> "It is urged that equity does not enjoin the prosecution and punishment of offenses under penal

ordinances, and we agree with that principle. What law is here being enforced? If it be the Building Code, then the proper official in the proper manner must do so. (continued.....) "The Code provided effective pains and penalties for violations and a method to compel compliance by building owners, but those methods were not used and that power was not exercised. We have been cited to no law permitting what was here done, nor have we been able to find it. Appellants have created an extralegal remedy, have then found appellees guilty in some sort of ex parte method, have invoked severe sanctions against them so as to put them out of business, and have afforded them no opportunity to be heard, tried, or correct any faults. This is not a suit to enjoin the enforcement of the law. It is a suit to require enforcement of the law. It is a suit to prohibit self-made, self-tried, and self-executed law. The action here complained against is the excessive use of authority, and equity will intervene when an officer transcends lawful bounds. 28 Am.Jur., Injunctions,§ 239.(continued.....) Magna Charta, June 15, 1215, in its celebrated 39th chapter is translated: "*No free man* shall be arrested or imprisoned, or

> *disseized, or outlawed, or exiled, or in any manner destroyed, nor will we proceed against him, or put burden upon him, except by the legal judgment of his peers, or by the law of the land."*
> *Constantin et al. v. Smith et al., Members of the Railroad Commission of Texas (3 judge district court, opinion by Hutcheson, Circuit Judge) 57 F.2d 227.*

Hoquiam's standardless, arbitrary and selective methods to designate and abate violated petitioner's rights without warrant, or authority of law.

Wyss's protected rights under 1997 Uniform Code for the Abatement of Dangerous Buildings were ignored. The City of Hoquiam and others are subject to 42 U.S.C.A. § 1983 damages claims.

Conclusion:

For the forgoing reasons, and the reasons stated in the Petition, Petitioners respectfully submit that their Petition For A Writ Of Certiorari should be granted.

Dated: November 24, 2004
Respectfully submitted.

JOHN R WYSS,
Petitioner